No. 193.

Brief of Whyte for Appellant

Supreme Court of the United States,

OCTOBER TERM, 1898.

Filed Mar. 20, 1899.

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THE ANGLO-CALIFORNIAN BANK, LIMITED, *Appellant*,

vs.

THE SECRETARY OF THE TREASURY, *Appellee*.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the Secretary of the Treasury for Review of a Decision of the Board of the United States General Appraisers, Relative to Certain Twenty Steel Rails.

BRIEF OF APPELLANT.

WM. PINKNEY WHYTE,
Counsel for Appellant.

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STATEMENT.

This case presents an appeal from a decision of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a Decree of the Circuit Court of the United States for the

Northern District of California, both of which Decrees it is sought by this appeal to reverse.

The course and manner of procedure in such cases are prescribed by sections 14 and 15 of the Act of Congress, entitled "An Act to simplify the laws in relation to the collec- " tion of the revenues," approved June 10, 1890, 26 U. S. Sta. 131. This Act is more familiarly known as the Customs Administrative Act of 1890. In accordance with its provisions the decision of the Collector, which was adverse to the importer, upon the protest of the latter, was reviewed and reversed by the Board of General Appraisers. On review of the last-mentioned decision, which was applied for by the Secretary of the Treasury, the Circuit Court reversed it, and in effect, affirmed the decision of the Collector. This decision of the Circuit Court was affirmed by the United States Circuit Court of Appeals, and these decisions are the subject of the present appeal.

The facts are few and simple. They are undisputed, being the subject of a stipulation of the parties, upon which the case has been tried throughout. (Rec., p. 13, Exhibit G.)

This particular merchandise was imported at the port of San Francisco, on the 2d day of March, 1887, by the Bank of California. It was part of 5,678 tons of like merchandise, imported by said Bank of California, at different dates between March 2, 1887, and the 24th day of June next following. On February 28, 1888, it was all subjected to warehouse entries, and placed in bond, in bonded warehouse. While in this condition it was purchased or assigned to the Anglo-Californian Bank Limited, the protestant and present appellant.

These entries were liquidated at the rate of $17 per ton, duty, the rate prescribed for such merchandise by the Act of March 3, 1883, then in force.

Upon the expiration of one year from March 2, 1887, the date of importation (the merchandise remaining in warehouse,) "an additional duty of ten per cent. was charged " upon the bonds against the merchandise" (Finding 2, Rec., p.

20,) under Section 2970 of the Revised Statutes. Four withdrawals for consumption were made prior to December 6, 1889, and within three years from the date of importations. The rest of the merchandise remained in bond, in the warehouse, duties unpaid, more than three years from the date of importation. No sale of merchandise, to enforce payment of duties was ever made, or steps toward one were ever taken; on the contrary, after the expiration of the three-year period, the Government permitted withdrawals, on various dates, between October 9, 1891, and March 24, 1894, amounting in all to 3,306 tons of rails, which had been in warehouse more than three years from date of importation.

The remainder of the merchandise continued in warehouse until March 16th, 1895, upon which day, the Anglo-Californian Bank Limited, withdrew said twenty rails for consumption, paying, under protest, duty at the rate of $17 per ton, which the Collector exacted under the Tariff Act of March 3, 1883, and an additional duty of ten per cent. also charged by the Collector against the merchandise entered.

This protest and the grounds thereof will be clearly understood when it is stated, that in the meantime, the Administrative Act of June 10, 1890, hereinbefore referred to, and the Tariff Act of October 1, 1890, (known as the McKinley Act) 26 U. S. Sta., and the Tariff Act of August 28, 1894, (the Wilson Act), had all been passed. To the end that this protest and the grounds thereof may be clearly understood, and for the sake of convenient reference, it is proper to quote the provisions of these Acts and those sections of the Revised Statutes here material.

REVISED STATUTES.

"Sec. 2970. Any merchandise deposited in bond, in any "public or private bonded warehouse, may be withdrawn for "consumption within one year from the date of original "importation, on payment of the duties and charges to which "it may be subject by law at the time of such withdrawal; "and after the expiration of one year from the date of origi-

" nal importation, and until the expiration of three years " from such date, may be withdrawn for consumption, on " payment of the duties assessed on the original entry and " charges, and an additional duty of ten per centum of the " amount of such duties and charges."

"Sec. 2971. All merchandise which may be deposited in " public store or bonded warehouse may be withdrawn by the " owner for exportation to foreign countries, or may be tran- " shipped to any port of the Pacific or Western Coast of the " United States, at any time before the expiration of three " years from the date of original importation; such goods on " arrival at a Pacific or Western port to be subject to the " same rules and regulations as if originally imported there. " *Any goods remaining in public store or bonded warehouse, beyond* " *three years shall be regarded as abandoned to the Government, and* " *sold under such regulations as the Secretary of the Treasury may* " *prescribe, and the proceeds paid into the Treasury.* In comput- " ing this three years, if such exportation or transhipment of " any merchandise, shall either for the whole or any part of " the term of three years, have been prevented by reason of " any order of the President, the time during which such " exportation or transhipment shall have been so prevented, " shall be excluded from the computation. Merchandise with- " drawn for exportation shall be subject only to the payment " of such storage and charges as may be due thereon."

"Sec. 2972. The Secretary of the Treasury, in case of " any sale of any merchandise, remaining in public store or " bonded warehouse beyond three years, *may pay to the owner,* " *consignee, or agent of such warehouse the proceeds thereof, after* " *deducting duties, charges, and expenses, in conformity with the* " *provision relating to the sale of merchandise remaining in a ware-* " *house for more than one year.*"

"Sec. 2973. If any merchandise shall remain in public " store beyond the period of one year, without the payment " of the duties and charges thereon, except as hereinbefore " provided, then such merchandise shall be appraised, by the " appraisers, if there be any such part, * * * and sold by

" the Collector at public auction, on due public notice thereof " being first given, in the manner and for the time to be pre- " scribed by a general regulation of the Treasury Department. " At such public sale printed catalogues, descriptive of such " merchandise, with the appraised value thereto affixed, shall " be distributed among the persons present at such sale, and " reasonable opportunity shall be given at such sale, to persons " desirous of purchasing, to inspect the quality of such mer- " chandise. The proceeds of such sales, after deducting the " usual rate of storage at the port in question, with all other " charges and expenses, including duties, shall be paid over to " the owner, importer, consignee, or agent, and proper receipts " taken for the same."

Section 2974 provides for the payment of the surplus of proceeds into the Treasury of the United States, if it remained unclaimed for the period of ten days after sale, and for its subsequent return to the owner on "proof of his interest."

Administrative Act 1890.

Sec. 20 of the Act of June 10, 1890 (the Administrative Act,) was as follows:

"Any merchandise deposited in any public or private " bonded warehouse may be withdrawn for consumption " within three years from the date of original importation, on " the payment of the duties and charges, to which it may be " subject by law, at the time of such withdrawal; provided " that nothing herein shall affect or impair existing provisions " of law in regard to the disposal of perishable or explosive " articles."

Section 29 of the same Act, after a specific enumeration of certain sections of the Revised Statutes, repealing them (but not specifically referring to Secs. 2970 and 2971,) contains the following:

* * * "and all other Acts and parts of Acts inconsist- " ent with the provisions of this Act are hereby repealed, but

"the repeal of existing laws, or modification thereof, embraced
" in this Act shall not affect any act done, or any right accru-
" ing or accrued, or any proceeding had or commenced in any
" civil cause before the said repeal or modifications; but all
" rights and liabilities under said laws shall continue and may
" be enforced, in the same manner as if said repeal or modifi-
" cations had not been made. Any offenses committed,
" * * * *"

McKinley Act, October 1, 1890.

The enacting clause of this Act was as follows:

"Be it enacted, etc., that on and after the 6th day of
" October, eighteen hundred and ninety, unless otherwise
" specially provided for in this Act, there shall be levied and
" paid upon all articles imported from foreign countries, and
" in the schedules herein contained, the rates of duty which
" are by the schedules and paragraphs respectively prescribed,
" namely:"

Then follows the schedules and paragraphs; among them was Schedule C, containing paragraph 141, which was as follows:

"141. Railway bars made of iron or steel, and railway
" bars made in part of steel, T rails, and punched iron or
" steel flat rails, six-tenths of one cent per pound." ($13.44 per ton.)

Section 50 of this act is as follows:

"Sec. 50. That on and after the day when this Act goes
" goes into effect all goods, wares, and merchandise previously
" imported, for which no entry has been made, and merchan-
" dise previously entered without payment of duty, under bond
" for warehousing, transportation, or any other purpose, for
" which no permit of delivery has been issued, shall be sub-
" jected to no other duty upon the entry or the withdrawal
" thereof than if the same were imported respectively after
" that day; provided that any imported merchandise, deposited
" in bond, in any public or private warehouse, prior to the 1st

"day of October, 1890, may be withdrawn for consumption at "any time prior to February first, eighteen hundred and "ninety-one, upon the payment of duties at the rates in force "prior to the passage of this Act, provided, further, that "when duties are based on the weight of merchandise, "deposited in any public or private bonded warehouse, such "duties shall be collected on the weight of such merchandise "at the time of its withdrawal."

Section 54 of this Act provided as follows:

"Sec. 54. That Section Twenty of the Act entitled 'An "Act to simplify the laws in relation to the collection "of revenues,' approved June 10, eighteen hundred and "ninety, is hereby amended to read as follows:

"Sec. 20. That any merchandise deposited in bond in any "public or private bonded warehouse may be withdrawn for "consumption within three years from the date of original "importation, on payment of the duties and charges, to which "it may be subject by law at the time of such withdrawal. "Provided, that nothing herein shall affect or impair existing "provisions of law in regard to the disposal of perishable or "explosive articles."

Section 55 of this Act also provided as follows:

"Section 55. That all laws and parts of laws inconsistent "with this Act are hereby repealed. Provided however, that "the repeal of existing laws, or modifications thereof, embraced "in this Act, shall not affect any act done, or any right accru- "ing or accrued, or any suit or proceeding, had or commenced "in any civil cause, before the said repeal or modifications, "but all rights and liabilities under said laws shall continue "and may be enforced in the same manner as if said repeal "and modification had not been made."

Wilson Act, August 28, 1894.

The enacting clause of this Act is as follows:

"Be it enacted, etc., * * * , that on and after the 1st "day of August, 1894, unless otherwise specially provided for

" in this Act, there shall be levied, collected and paid, upon " all articles, imported from foreign countries, or withdrawn " for consumption, and mentioned in the schedules herein con- " tained, the rates of duty which are by the schedule and " paragraphs, respectively prescribed, namely: "

Among the schedules and paragraphs of the Act is Paragraph 117 of Schedule C, which is as follows:

"117. Railway bars, made of iron or steel, and railway " bars made in part of steel, T rails and punched iron or steel " flat rails, seven twentieths of one cent per pound" (or com- " puting upon statutory basis, of 2,240 pounds to the ton, " $7.84 per ton.)

There are in the Act a few repeals of specifically enumerated laws, and the following general repealing clauses.

"Sec. 72. All Acts and parts of Acts inconsistent with the " provisions of this Act are hereby repealed, but the repeal of " existing laws or modifications thereof, embraced in this Act, " shall not affect any act done, or any right accruing or " accrued, or any suit or proceeding had or commenced, in " any civil cause, before the said repeal or modifications; but " all rights and liabilities under said laws, shall continue and " may be enforced in the same manner, as if said repeal or " modifications had not been made. * * * "

Grounds of Protest.

Under these conditions of facts and legislation, the grounds of protest briefly stated in substance were, that the Act of March 3, 1883, prescribing a rate of duty upon such merchandise of $17 per ton, and Section 2970 of the R. S., imposing an anditional duty of 10 per centum upon merchandise which had remained in warehouse in bond under warehouse entry, for a period of more than one year from date of importation, do not apply to the present merchandise; and it is only dutiable under the Wilson Act, of Aug. 28, 1894, at the rate of $\frac{7}{20}$ of one cent per pound or $7.84 per ton, under paragraph 117 thereof.

THE CONTENTION OF THE PARTIES.

The appellant asserts:

That when the McKinley Act went into effect the specific rate of duty upon this merchandise was thereby changed from $17 per ton to $13.44; and this rate was again changed by the Wilson Act to $7.84 per ton.

2. That Sec. 2970, R. S., has been repealed by these enactments and is inapplicable to this merchandise.

The appellees contend:

1. That by permitting the merchandise to remain in warehouse for a period of more than three years duties unpaid from date of importation, it was abandoned to the government under Sec. 2971, R. S.

It is no part of the contention of appellant that, had this merchandise been sold by the Government in 1890, when the three years bonded period expired, the duties then due and payable would have been other than those of the Act of 1883. It is fully admitted that the duties then due were those imposed by that Act, including the ten per centum additional.

It is also admitted that the same rates of duty would have then applied, whether the goods had been sold by the Government to satisfy its claim, or had been withdrawn for consumption and the duties paid by the importer.

It is further admitted that these rates applied until Congress made a new tariff changing the rate and amount of duty, on "all goods * * * previously imported * * * under "bond, for warehousing * * * *or for any other purpose* for "which no permit of delivery has been issued" (Sec. 50, McKinley Act).

It is further admitted that at the termination of the bonded period of three years the lien or claim of the Government matured in the sense that the goods were subject to sale; and it is also admitted that the Government at the expiration of the three years could have sold this merchandise by virtue of Section 2971, R. S., but would have been required to turn

over to the importer the excess of proceeds, after deducting the duties and charges incurred by the goods. The liability, however, of the owner to lose his goods by their sale was the only disability incurred under the statute.

Nor are the general propositions of law disputed, that the Statutes relating to the customs revenues shall be construed as a whole and complete system of laws, and that each alteration must be considered in the light of its evident bearing in relation to the entire customs revenue system. It is denied that this merchandise became the *property* of the Government at the expiration of three years from the date of its importation, as claimed by the Solicitor General for the appellee.

Argument.

I.

The nature of the interest of the goverment in imported merchandise. Ownership always remains in the importer.

It is obvious that it cannot be intelligently ascertained whether merchandise has been abandoned by an importer, and whether any right has been saved to the government or any individual, at a particular time, or by the occurrence of events or conditions, without an understanding of the nature of the right itself, in its relations to the system of laws creating it; and so it is to be remembered that the duties imposed upon imported merchandise are imposed for the sole purpose of collecting revenues for the use of the government, and are in the nature of tax laid upon the goods themselves. They are not intended, primarily or at all, to afford means of acquiring title to the merchandise, or divesting the owner of it. The merchandise is taken possession of by the government immediately upon its arrival, strictly as security for the payment of duties to which it is subject, and this right to duty accrues as soon as it arrives in port. The right does not arise from the possession of the merchandise, but by virtue of their importation. (The Liverpool Hero, 2 Gall.,

184; *U. S.*, vs. *Vowell*, 5 Cranch., 368; *Meredith* vs. *U. S.*, 13 Peters, 486; *U. S.* vs. *500 Boxes*, 2 Abb., 500.)

Although the duties attach instantly upon importation, the owner is given an option either to pay the duties immediately and take possession of the goods, or to postpone the payment by depositing them in bonded warehouse, giving bond in double the sum of the estimated duty (Sec. 2964, R. S.)

The bond mentioned is further security for the payment of the duty.

But it cannot be resorted to until the goods are withdrawn and a deficiency arises, or upon deficiency arising after sale.

The merchandise remains in the possession of the Government at the sole risk and expense of the owner (Sec. 2965 R. S.; *Clark* vs. *Peaslee*, 1 Cliff., 545; *U. S.* vs. *Benzon*, 2 Cliff., 512.)

The relation of the Government and the importer are in no sense contractual; their rights are created by law and subject to change at any time by law. Congress has the power, and exercises it, to increase or decrease, or to entirely remove the duty on merchandise while remaining in bonded warehouse (*U. S.* vs. *Benzon*, *supra.*)

We assert that under the Statutes, as they now stand, the Government never acquires title to imported merchandise. It belongs to the importer until sold, and then it belongs to him who buys it, and there is no authority for the Government to buy it. This conclusion is made more manifest and certain from the fact that at all times, no matter how long the merchandise remains in warehouse, it is there at the expense and risk of the owner. In the present case it is not contended that after the expiration of three years the Government ever paid any storage, any insurance, or incurred any liability whatever touching these goods, after the expiration of three years, as it naturally and necessarily must have done if they had passed to the ownership of the Government. On the contrary, the importer was required by law, by the regulations of the Treasury, and by the administrative officers, to

pay and discharge all such charges, and respond to all the liabilities of ownership, and the importers met the requirements. (See Stipulation, Exhibit G, Rec. p. 14.)

If the Government had owned this merchandise, why did they permit, not only permit, but require, importers to carry burdens which the law rested on its own shoulders as owner?

As to the present merchandise, the ownership of the importer was further recognized by permission to him to withdraw it at all times after the expiration of three years, up to and including the present entry, and by subsequent permission to withdraw the entire importations, involving twenty different transactions, and the payment of duties of over $50,000, in harmony with Section 4 of the Administrative Act of 1890, which limits the right to make entry to the owner, consignee, or agent, and in all cases requires the oath to be supported by the oath of the owner.

Authority and power of Secretary of the Treasury.

This recognition of ownership in the importer by the Secretary of the Treasury, was not the act of an unauthorized agent of the Government, and therefore, *ultra vires*. The rights of the Government as to the duties owing to it and the manner of enforcing payment, including sale, have been prescribed by law from the time of the enactment of the Warehouse Act in 1846, down to the present time; and throughout this whole legislation the broadest powers have been given to the Secretary of the Treasury to prescribe regulations as to modes. The statutes and the rulings of Courts make him the superintendent of the collection of the revenues, and in the exercise of his administrative functions respecting the manner of collecting, no restraint is placed on his discretion when it does not contravene the express requirements of the statute (Sec. 249, R. S.; *Aldridge* vs. *Williams*, 3 How., 9; *Campbell* vs. *U. S.*, 107 U. S., 407; *Balfour* vs. *Sullivan*, 17 Fed. Rep. 31; *Pascal* vs. *Sullivan*, 31 Fed. Rep. 496; *U. S.* vs. *Jones*, 18 How. 92.)

The power to sell was conferred, but the time of sale was not fixed by statute, and the postponement from time to time

was fully within the exercise of his discretion and subject to the language to be found in all the revenue statutes and Acts, conferring the power to make regulations as to such sales. There is certainly no express provision prohibiting the postponement of sale, or the power of the Secretary of the Treasury to permit withdrawal after the expiration of the three year period; so that the recognition of the ownership of the importer by the Secretary of the Treasury after the expiration of three years becomes binding and conclusive upon the Government; and the fact that this construction of the statutes recognizing the importer as the owner of the merchandise, has continued and been accorded, unbrokenly and unbendingly, for a period of more than twenty-two years, is persuasive of the proper meaning of these statutes, as has often been declared by the Courts, and would be sufficient to turn the scale if any doubt or ambiguity existed. (*United States* vs. *Jahn*, 65 Fed. 792, C. C. A.; *Roberson* vs. *Downing*, 127 U. S., p. 607; *Brown, Admrx.*, vs. *United States*, 113 U. S. 568; *Dixon* vs. *U. S.*, 68 Fed., 534.)

In the case of Roberson, *supra*, the Court say: "The "regulation of a department is not, of course, to control the "construction of an Act of Congress, when its meaning is "plain, but when there has been a long acquiescence in a "regulation, and by it, rights of parties for many years have "been adjudged and adjusted, it is not to be disregarded "without the most cogent and persuasive reason."

In the case of Brown, *supra*, the Court said, in conclusion: "These authorities justify us in adhering to the construction "of the law under consideration adopted by the Executive "Department of the Government."

Edwards vs. *Darby*, 12 Wheat., 206.
U. S. vs. *Hill*, 120 U. S., 169, 182.

While the letter of the Secretary of the Treasury to the Collector relative to this present merchandise (Rec. p. 11), which finds its way into this record, only because of the peculiar provisions of the Administrative Act of 1890, recites

that a reference to the decisions of the department for a long series of years shows that it has uniformly held that duties on merchandise in warehouse beyond three years was not subject to subsequent increase or decrease, it is remarkable that not one regulation or decision of this uniform line was instanced, or can be found until the entry of the present merchandise. And this assertion becomes more remarkable, in view of the fact that Article 767, of the Customs Regulations of the Treasury Department (Edition of 1874), and Article 1031, of the Edition of 1884, both recognize the right of the importer to enter his merchandise and pay the duties after the expiration of three years. And Treasury Department Circular (dated February 29, 1884), still in force, expressly authorizes the withdrawal of merchandise which has remained in bond more than three years after that date, a fact which was referred to and which was persuasive in the decision of the Board of United States General Appraisers in this case. (Rec. p. 18.)

Moreover, in *United States* ats. *Abbott*, 20 Court of Claims Rep. 280, the practice of allowing such withdrawals was referred to by the Court as grounds of its decision as then in existence and reference is made to an opinion of the Attorney-General, dated February 7, 1884, in which the practice was alluded to as then existing, and approving that practice as conforming to law. (See also Appendix.)

II.

The words "shall be regarded as abandoned to the Government," used in Section 2971, were repealed by the latter Sections 2970–2973 and 2974.

These sections were all enacted in the Revised Statutes at the same time, but an examination of previous revenue legislation shows that their provisions are so repugnant as to deprive the words quoted of all reasonable meaning and effect under the rule that when provisions of the same Act are so repugnant that they cannot be otherwise harmonized, those

occurring earlier must yield to the latter. (Sutherland on Statutory Construction, Sec. 220, and cases cited in note.)

By the Warehouse Act of August 6th, 1846, (9 U. S. Stat., 53), one year was allowed for payment of duties on warehoused merchandise on withdrawal for consumption, or for exportation without payment. At the expiration of one year the merchandise, if not withdrawn or exported, was to be sold, after public notice prescribed by the Treasury Department, as to time and manner, "and the proceeds of sale, after "deducting storage, charges, expenses and duties should be "paid over to the owner, importer, consignee or agent." By the Act of March 3rd, 1849, (9 U. S. Stat., Sec. 5, p. 399), the time for exportation was extended to two years.

By the Act of March 28th, 1854, (10 U. S. Stat., Sec. 4, p. 271), it was provided that merchandise entered for warehousing might continue in warehouse for the period of three years, even after the payment of duties.

By the Act of August 5th, 1861 (12 U. S. Stat., Sec. 5, p. 293), as a war measure to hasten the payment of revenue, it was provided that warehouse goods "designed for consump-"tion in the United States must be withdrawn, or the duties "paid, within three months after the same are deposited, or "within two years, upon payment of the duties, with 25 per "cent. additional, or may be withdrawn for exportation at "any time before the expiration of three years; such goods, "if not withdrawn in three years, to be regarded as aban-"doned to the government, and sold under such regulations "as the Secretary of the Treasury may prescribe, and the "proceeds paid into the Treasury." (The first time words as to abandonment were used and the first time the proceeds were required to be paid into the Treasury, and not to the owners, etc.)

This was followed by the Act of July 14th, 1862 (12 U. S. Stat., Sec. 21, p. 560), still under the exigency of war, which provided that merchandise "thereafter deposited in bonded "warehouse must be withdrawn or the duties paid within "one year," or withdrawn for exportation within three years,

and that "any goods remaining in public store or bonded "warehouse beyond three years shall be regarded as aban- "doned to the Government and sold, under such regulations "as the Secretary of the Treasury may prescribe, *and the pro- "ceeds paid into the Treasury.*" The requirements in both the Acts, using the words relative to abandonment, were that as an effect the proceeds of sale were to be paid to the Treasury, regarding the owner as having no further interest in them.

By the Act of July 28, 1866 (14 U. S. Stat., Sec. 10, p. 330), the provisions of the Act of 1846 were amended so as to restore the requirement of the last mentioned Act that after sale of the merchandise the excess of proceeds should be paid to the owner, etc; and by another Act of the same year, March 14 (14 U. S. Stat., Sec. 1, p. 8), the time for withdrawal for consumption was extended to three years, on payment of duties and an additional 10 per cent. It will be seen, therefore, that the Acts of 1846, 1861, 1862, and 1866 are wholly inconsistent as to the disposal of proceeds, and that their re-enactment into Sections 2971, 2972, *et seq.*, of the Revised Statutes necessarily leaves the provisions of those sections equally so, so as to bring them fully within the rules of construction here invoked in respect to the effect of later upon earlier provisions in cases of repugnancy (*U. S.* vs. *Abbott*, 20 Court of Claims, page 280).

The effect of these statutes is to be gathered by a reading of their context and by a comparison one with the other, and by at all times keeping in mind the purpose of tariff legislation and the system of revenue laws. The revenue law as a body must be taken by its four corners, and in all cases of conflict specific intent must control general intent.

That repugnancy exists between the provisions of Sections 2971 and 2972 is shown by the fact that from the time of the Warehouse Act of 1846 to the Act of 1861 every incident to ownership remained in the importer up to the time of the payment of the surplus of the proceeds of sale to him. The title literally remained in him until such sale, and after the

sale, in the converted form, his title attached to the excess of the proceeds, as the result of his ownership of the merchandise.

From 1861 to 1866 the law declared his property was abandoned after the expiration of three years, and all incident rights of ownership surrendered. The proceeds were paid absolutely into the Treasury, and could not be followed by its previous owner, and they were deemed abandoned.

In 1866 the Act of Congress restored the provisions of the Act of 1846, and by them his right to follow the proceeds of sale, as to the excess over duties, etc. These conditions are clearly inconsistent with each other, and necessarily the Acts of Congress creating them were also inconsistent; otherwise there would have been no change or necessity for the enactments themselves. Both the Acts of 1846 and 1862 were re-enacted into revision of the statutes, their inconsistencies with them.

We have seen that by the practice of the Treasury Department, Sec. 2971, as to abandonment, has been construed as repealed, but we desire to call particular attention to the Abbott case, 20 Court of Claims, 280, *supra*.

Abbot Case.

The decision in this case was by the Court of Claims. It involved a construction of the Act of 1883, and related to 66,575 pounds of wool in bonded warehouse at Boston, where it had been beyond the period of three years.

A section of that Act provided as follows:

"That all imported goods, wares, and merchandise which "may be in the public stores or bonded warehouses on the "day and year when this Act shall go into effect, except as "otherwise provided in this Act, shall be subjected to no "other duty upon the entry thereof for consumption than if "the same were imported respectively after that day; and all "goods, wares, and merchandise remaining in bonded ware-"houses on the day and year this Act shall take effect, and

" upon which the duties shall have been paid, shall be entitled " to a refund of the difference between the amount of duties " paid and the amount of duties said goods, wares, and " merchandise would be subject to if the same were imported " respectively after that date."

The duties had been paid in March, 1871, and a claim for refund, under the Act of 1883, was made. The defense was abandonment under Sec. 2971, R. S.

The Court of Claims held that the claimants were entitled to this refund.

We quote the pertinent part of the opinion of Judge Schofield, who spoke for the Court:

" The language of this section, so far as it relates to goods " upon which the duties had been paid, is very general. " Taken by itself, it fully sustains the claimants' demand, for " their goods were in the bonded warehouse when the Act " went into effect, and the duties had been paid."

The defendants, however, contend that the claimants can derive no benefit from this section because their goods, having been in bonded warehouse for more than three years, were abandoned to the Government, under Section 2971, Revised Statutes. This section provides that " any goods " remaining in public store or bonded warehouse beyond " three years shall be regarded as abandoned to the Govern- " ment, and sold under such regulations as the Secretary of " the Treasury may prescribe."

" Standing by itself this section might support the defend- " ant's position. It implies that the title of the original " owners, by lapse of time and operation of law, has become " divested and the Government has succeeded to the owner- " ship. The original Act, July 14, 1862 (12 Stat. L., p. 560), " from which this section is taken, was based upon that " theory, and so it provided that the proceeds of sale should " be paid into the Treasury. The character of this provision " and purpose of the Government have been entirely changed " by the Act of July 28, 1866 (14 Stat. L., p. 330), now Sec-

"tion 2972, which provides that 'the Secretary of the "Treasury may pay to the owner, consignee, or agent of such "merchandise the proceeds thereof, after deducting duties, "charges, and expenses.'"

"Since this enactment the goods are no longer to be re-"garded as abandoned by the owner to the Government. "The ownership continues without change, but after the sale "attaches to the net proceeds instead of the goods. The two "sections construed together provide a mode for the collec-"tion of duties and charges, and the clearance of the ware-"houses. When the goods have remained in bond more than "three years the Government acquires a right to sell them "for the purpose named, but cannot pocket the proceeds. "Hence the practice has arisen in the Treasury Department "to allow the owner at any time before the goods are adver-"tised for sale, to remove the same, upon the payment of duties "and charges. Of this practice the Attorney-General, in an "opinion addressed to the Secretary of the Treasury, dated "February 7, 1884, says: 'I perceive no legal objection to "the existing practice of your department * * whereby, "in lieu of a formal sale, the owner, consignee, or agent, is "permitted to pay the duties, charges, etc., that have accrued "thereon, and take them away."

"We not only see no legal objection to this practice, but "we do not see how the Secretary could, with propriety, "adopt any other. A sale of the goods for the mere pur-"pose of collecting charges or clearing the warehouse, while "the owner is willing to pay the charges and remove the "goods, would only cause trouble and expense, without a "particle of advantage to anybody, except possibly to spec-"ulative purchasers at forced sale."

"It may also be observed that the tenth section of the late "Tariff Act is remedial in its purpose, and to effect that "purpose should be liberally construed. By its terms 'all "goods, wares, and merchandise remaining in a bonded ware-"house on the day and year this Act shall take effect, and "upon which the duties shall have been paid, shall be entitled

" to a refund,' etc. The claimants' goods remained in the " bonded warehouse and the duties had been paid. No sale " had been authorized, and, according to the practice of the " Treasury Department, none would be authorized unless the " owners refused to pay the charges and remove the goods."

"Apparently Congress intended that all goods remaining " in the bonded warehouse July 1, 1883, and which, according " to the construction and practice of the department under " Sections 2971 and 2972 might be withdrawn by the consig- " nee upon payment of duties and charges, should go upon " the market with no heavier burdens than were to be im- " posed under the new tariff, upon latter importations."

It must be remembered that under the regulations of the Treasury Department at the time of the Abbot importation (in 1881), imported merchandise was permitted to remain in bonded warehouse even after the payment of duty. The Act of 1883, as is seen from the section above quoted, provided for a refund of duty upon such merchandise, if a higher rate had been paid thereon than the Act imposed. This was done for the reason that although duties had been paid the merchandise had not entered the market, and according to uniform policy, provision was made to permit its entrance into the market upon equal footing with like merchandise thereafter imported.

This legislation was specific, relating to this particular class of merchandise, namely, warehoused goods on which duties had been paid. The form in which the issue was presented to the Court necessarily involved the construction of Section 2971, because the defense was that the merchandise had been abandoned by remaining in warehouse more than three years.

The decision comports with the well defined principles underlying tariff legislation, and adopted by courts in construing it, that effort must not be made to find technical meaning in words and phrases merely to subject the importer to the payment of higher rates of duty; and all obscurities, if they exist, shall be resolved in his favor and that penal effect

should not be given to revenue statutes except in cases of express provision.

The Court could not have reached any other conclusion without violating all of these principles. To hold that the owner of property should be divested of his title thereto at a given point of time to be revested at another without his consent, or any act of the owner, would be technical in the strictest sense of the term and would attach a punitive effect to the law in the highest degree.

This is made plain by the reference of the Court to the inutility of a sale when the importer desires to pay the duty. Under the warehousing system, now existing, merchandise therein cannot become subject to any charge except duties and such as are incident to their custody, and these charges apply to all merchandise without respect to the period during which they have been warehoused. The Government derives no benefit from storage and incurs no risk or liability for safe keeping, nor does it derive any benefit or advantage from the sale, which it would not have gained if the importer had paid the duties and charges before sale. In case of sale, however, the owner would be punished by loss of possession and control of the property. He would be prevented from subjecting it to the performance of contracts made respecting it, probably to his great damage, and with great disturbance to his business affairs, and he would be mulcted in a sum equivalent to the expenses of sale, besides which the surplus of proceeds finally received by him would be further diminished by the exigencies of a forced sale.

As stated by the Court in the Abbot case no person would be benefited but the speculative purchaser at a forced sale.

It is not possible that the tariff law intends such a meaning to be derived from its words and provisions.

The opinion in the Abbot case was rendered by Judge Schofield, who had served for many years as a member of Congress. Besides this, Judge Schofield had had a long experience as Justice of the Supreme Court of the State of Pennsylvania.

The Court of Claims is itself of dignified rank, as a judicial body, and the decision in the Abbot case was not appealed from and has been accepted by the Treasury Department as the law governing the business of the country respecting merchandise in warehouse, since its rendition, in 1885.

This case was presented to the Court by the Assistant Attorney-General and Mr. Blair, who had himself had a long experience as an officer of the Department of Justice.

Mr. George S. Boutwell presented the case on behalf of the importer. The history of this distinguished attorney is familiar to this Court. He had been successively Governor of Massachusetts, member of Congress, Commissioner of Internal Revenue, again member of Congress, Secretary of the Treasury, then U. S. Senator. He is one of the most distinguished lawyers in the country in all branches of the profession, but particularly that one which relates to the revenue laws.

III.

Matters to be considered in ascertaining intent of statutes.

Rules of Interpretation.

The meaning of words will be expanded or limited in order to harmonize all sections to reach the intent, and give effort to all provisions.

Sutherland, Sec. 218.

It is therefore proper to consider the meaning of the word "abandonment," as used in other statutes, in order to derive the general sense of the doctrine of abandonment, and whether it can be made to apply to this case.

This doctrine is not frequently invoked or adopted by the United States Statutes.

Provision was made for the sale of captured or abandoned property during the Rebellion (Sec. 1079, R. S.,) and for the sale or collection of abandoned or derelict public property (Sec. 3755,) and for the reversion to the Government of land abandoned by a settler for more than six months (Sec. 2297.)

Aside from Section 2971, under consideration, the word abandonment only stands in tariff legislation in the Act of July 14, 1862, of which 2971 is a re-enactment, and in Section 23 of the Act of June 10, 1890, in which latter provision is made for the abandonment to the United States of damaged merchandise, by which abandonment the importer is relieved from the payment of duties.

In all of these instances, excepting that of 2971, the word abondonment involves the element of the voluntary surrender or giving up of the property dealt with.

In the case of captured or abandoned property, in times of war, the property is contraband and confiscated as belonging to a public enemy.

In the case of the preservation and sale of wrecked, abandoned or derelict property, the statute deals with its own property, and that subject to maritime disaster and condition.

There is a further maritime use of this word, relating to the surrender of vessels by the owner to, or for the benefit of, his creditors, by which he is relieved of certain further liabilities.

In the case of abandonment by a settler on the public domain it is simply the lapse of an incohate right, since the title to the land remains in the Government until all the law is complied with and the settler voluntarily surrenders his right to perfect title.

In the case of the surrender of damaged imported merchandise by the importer, under Section 23, he voluntarily surrenders the property to the Government to become and be its own, on the condition that he be relieved from the payment of duties thereon.

He says to the Government, this property is not worth the duties to me, you may take it and absolve me from the payment of the duties. I have no further claim upon or interest in it. You may sell it and have all the proceeds, and under Section 23, the Government is compelled to accept this proposal.

There can be no question that when this word abandonment first appeared in tariff legislation in the Acts of 1861 and 1862, it was intended that the importer or owner, who left his merchandise in warehouse beyond the period of three years, should lose all the rights incident to ownership, and that the Government should acquire them. It may be well doubted whether such drastic legislation did not violate the Constitution of the United States by summarily depriving the owner of his property upon the mere maturity of a debt, and without compensation and due process of law; but however that may be, unquestionably it was the intention of that Act that the property and all the right and interest of the importer in it should be taken from him.

The Act of August 6, 1845, (9 Stat. at Large, page 53,) made provisions for the sale of merchandise of this class, and for the payment of the excess of proceeds of sale after deducting duties, etc., to the owner just as Sections 2972-3-4 now do.

This provision continued in force up to the Act of 1861. The word abandonment had not yet appeared. But in that year, under the exigencies, conditions, and wants of the nation incident to that time, demanding means for the maintenance of the public credit and expedition in the collection of revenues, and to fix a time when revenue debts might be collected and payment enforced, Congress passed the Act (12 Stat. at Large, page 559), by which, for the first time in tariff legislation, it was declared that an owner could be compelled to abandon his property by merely leaving it in a bonded warehouse for a given period of time.

For the first time he was then deprived of any right or claim to any part of the proceeds of the sale of his merchandise. This provision was substantially repeated in the Act of 1862, when the provisions of the Act of 1846 were restored, as to the ownership of the merchandise, and the excess of proceeds of sale.

Whatever flexibility these words concerning the abandonment of merchandise possess, must be tested in this manner.

Consideration must be given to the nature and purpose of the warehouse system, which has been characterized by Mr. Gladstone as the greatest agency for the promotion of commerce known to modern civilization. The permission to leave merchandise in the warehouse under bond for the payment of duties, is in the direction of extension of credit for such payment, given by the Government, out of regard for the welfare and business interests of importers in marketing their importations, so that the revenue laws may be enforced with as little disturbance to public business as possible, since the duties upon imports are the chief sources of the revenues of the country, and the welfare and the prosperity of the nation depend upon them.

This policy is further made manifest by the provisions, uniformly enacted into tariff laws, when changes of rates have been made, to enable importers to adjust their business in the payment of duties, to meet the new order of things, and to place them upon a parity of footing in the markets, with previous and subsequent importers of merchandise, upon which duty has not already been paid. The laws which we are now discussing in this case are instances, and its predecessors are innumerable.

It is to be remembered, too, that revenue statutes are not penal in character, but remedial, and that they are enacted under the power of the Government to tax, and that when the exercise of this power is invoked, the tax cannot be sustained, unless it appears fully to come within both the letter and the spirit of the law, and if there are doubts upon a question, and two constructions may be given to statutes, one of which would impose the tax, and the other not, the latter construction in favor of the importer, should be adopted.

Sutherland, Section 351.
Vittells, 20th Rule of Construction.
National Bank vs. *Deering*, 91 U. S., 29.
Renfroe vs. *Calguitt*, 74 Ga. 619.
Taylor vs. *U. S.*, 3 How., 197.
U. S. vs. *Minderse*, 7 Blatch., 483.

U. S. vs. *Breed*, 1 Sum., 159.
U. S. vs. *Isham*, 17 Wall., 504.
U. S. vs. *Wiggleworth*, 2d Story, 569.
U. S. vs. *Morse*, 3d Story, 87.
Adams vs. *Bancroft*, 3d Sum., 387.

In *Adams* vs. *Bancroft*, the Court says: "Laws imposing "duties are never construed beyond the natural import of the "language used, and duties are never imposed upon the "citizen upon any doubtful interpretation, for every duty "imposes a burden upon the public at large and is construed "strictly, and must be laid out in a clear and determined "manner from the language of the statute."

In *United States* vs. *Isham*, *supra*, the Court says: "A tax "cannot be imposed without clear and express words to that "purpose."

In *United States* vs. *Wigglesworth*, the Court says: "Statutes "levying duty on citizens and subjects are to be construed "most strictly against the Government, and in favor of the "citizen or subject, and their provisions are not to be "extended by implication beyond the clear import of the "language used."

Hartranft vs. *Weigmann*, 121 U. S., 615.

Nor can the fact be ignored that the retention by the Government of merchandise for security for the payment of duties, in a certain degree, deprives the importer of the enjoyment of his property, and, to that extent, is an interference with legitimate industries and the ordinary uses of property, which are treated with conservative regard for the liberty of the citizen in his laudable business. "Such interferences," says Mr. Sutherland, (Section 370), "are cautiously justified "on principles of the common law, and only in cases of "imperative necessity, or under valid statute plainly express-"ing the intent."

Thus, reading these sections of the Revised Statutes, it must be gathered from them that they are intended to govern

the collection of duties on merchandise at such rates as the law may provide; that they contemplate that changes may be frequently made; that the Government extends credit to the importer for the convenience of his business, and takes possession of the merchandise as a security for the payment of his debt; that during the period of three years it is not intended that this debt should be enforced, or at all, until the importer, and no other person, pays the debt and takes the merchandise away; that the expiration of three years was fixed by the Government as the time at which it could proceed to enforce the payment of the debt by resorting to its remedies, by sale of the merchandise and application of the proceeds to the payment of the duty, and of the excess over such duties and charges, to the owner, or, if there should be a deficiency, then by proceedings against the principal and the sureties on the bond. But in the absence of express provision to that effect, it is not to be inferred that there can be any time, so long as the merchandise is undisposed of, that the owner has not the right to pay his debt and take his property.

It is not to be presumed that Congress intended to punish the importer by subjecting his property to a forced and unnecessary sale, from which the Government would derive no benefit, or that the owner, on the mere maturity of the debt, was to practically forfeit his merchandise; but every intention of the statute is met, and all of its provisions are harmonized with ascertained intent, under that construction by which they are read as giving to the Government the power to sell upon the expiration of three years, just the same power as was contained in the Act of 1846, but without regard to the words relating to abandonment.

It might be safely admitted that this power to sell at such time still stands in the statutes as fixing the time for the maturity of the debt, and that such a right in the Government has been saved, but it would by no means follow that upon the expiration of three years, the rights of the importer are foreclosed by the mere lapse of time; and this is evidenced

by the provisions made for the payment of the surplus to the owner, and the minute precautions in the statute to protect the rights of the owner at every step, before, at, and after the sale. At every step the right of ownership is recognized by the statute; at every step the owner, as such, is named in the statute.

IV.

Effect of the Administrative Act of 1890, and the McKinley and Wilson Acts, upon this merchandise.

Assuming that we have satisfactorily shown that the abandonment provisions of Section 2971 do not apply to this merchandise, it is evident that these Acts changed the rate of duty upon this merchandise, unless something in their provisions can be found to except it from their operations, and the question is fairly and squarely presented whether the right of the Government to collect duties on certain merchandise, at a certain rate, which has been specifically changed by a subsequent Act, is saved to the Government, by general saving words as to accrued rights found in the same Act, which changes the rate. In other words, whether an Act which provides that on and after its passage "there shall be "levied, collected, or withdrawn for consumption on all "articles imported from foreign countries, or withdrawn for "consumption and mentioned in the schedules herein con-"tained, the rates of duty which are by the schedules and "paragraphs respectively prescribed," and which repeals all Acts and parts of Acts inconsistent with it, not merely by implication, but by express words to that effect, saves the rights of the Government to levy and collect duties at previously existing rates on merchandise withdrawn for consumption, after the passage of the Act, by the general saving clause to the effect that said "Act shall not affect any act done "or any right accruing or accrued, or any suit or proceeding "had or commenced in any civil cause before the said repeal "or modifications; but all rights and liabilities under said "law shall continue and may be enforced in the same manner

"as if said repeal or modification had not been made." * * * (Wilson Act, Section 72).

The Administrative Act of 1890, as will be seen from an examination of its terms, was chiefly addressed to procedure and remedy, and changed modes of collection materially. (One important change was the creation of the Board of General Appraisers itself), and, by Section 29 of the Act, a similar saving provision as to acts done, liabilities incurred and rights accruing and accrued under existing laws was incorporated in that Act. At this time Section 2970, R. S., which imposed the additional 10 per cent. duty on goods remaining in warehouse after one year, was still in force, but the Legislators, perceiving that there was some obscurity in the language of that section as to the basis of the computation of the additional 10 per cent. cleared it up by the enactment of Section 20 of the Administrative Act of 1890.

Section 2970 required payment, upon withdrawal within one year, of the duties to which the merchandise might be subject at the time of withdrawal; but the same section required payment of the additional 10 per cent. to be made on goods withdrawn after one year, but before the expiration of three years, to be made upon the basis of the original entry, without regard to any change which might have been made in the meantime.

Section 20 of the Administrative Act placed it beyond question that the basis of the additional 10 per cent. upon all merchandise withdrawn after one year, should be the duties enforced at the time of the withdrawal, just the same as that withdrawn within one year; that is to say, that there should be no question that all merchandise in warehouse should have the benefit of any change which might be made while it was in warehouse, and thus the italics of the Circuit Court, have no more force and effect than if the print stood in long primer, as required by the rules of that Court. As we shall presently see, this section 20 was carried forward into the subsequent McKinley Act, Section 54, the effect of which, upon said Section 2970, will be hereafter considered.

THE MCKINLEY ACT.

Section 1 of this Act specifically required a levy and collection of duties on imported merchandise, on and after October 6, 1890, at the rates therein provided. It required the levy and collection to be made after that date.

Section 50 of the same Act imposed the same duty on all merchandise which was then in warehouse, whether entered or not, for whatever purpose it might be there, so long as no permit of delivery had been granted and duties had not been paid, as if the merchandise had been imported after the Act went into effect. It ought not to be questioned that the present merchandise falls within the provisions of this section and it is not questioned, unless there is something to be found in other provisions to take it out.

Is its status disturbed by Sections 54 and 55, as contended by appellee? We have discussed the effect of Section 20 of the Administrative Act, at the time of the passage of the last mentioned Act. When re-enacted by Section 54 of the McKinley Act, it gathered a new force and effect, because at the time of the passage of the Administrative Act no change had been made in the rate ot duty on this merchandise since the date of importation; but the purview of the McKinley Act was to change the rate, so that not only was the merchandise to be withdrawn under Section 54 at the rate to which they might be subject at the time of withdrawal, instead of the rate of original entry, but they were to be withdrawn without the payment of the additional ten per cent.; so that Section 51 repeals Section 2970 *in toto*. This is not only admitted by the appellee in this case; but the decision of the Courts are uniform to that effect.

Opinion of Attorney-General, Jan'y 17, 1895.
Schmid vs. *U. S.*, 54 Fed. 45.
U. S. vs. *McGrath*, 50 Fed., 404.
In re Schmid, 54 Fed., 145.

In the case of the *United States* vs. *Schmid*, *supra*, the question was whether the ten per cent. could be collected on

goods withdrawn from bond more than one year after deposit and whether Section 2970 had been repealed by Section 20 of the Administrative Act. In holding that such duties could not be collected on such merchandise, and that Section 2970 was so repealed, the Court quoted from the decision of the Supreme Court in *Hartranft* vs. *Oliver*, 125 U. S. 525, as follows:

"The plain meaning of this section is, that though the "goods are imported before the Act takes effect, yet if they "were kept until after that period in a public store or bonded "warehouse, that is, in the custody and under the control of "officers of the Customs they shall be subjected only to the "duties thereafter leviable when they are entered for consump- "tion. * * * In other words, goods imported before the "Act took effect, if kept in custody and control of the Gov- "ernment, are to be charged with duties according to the "law in force when they are entered for consumption."

The Rule of Inclusio Unius est Exclusio Alterius.

Clearly, thus far, Section 54 has not aided appellee's contention, but it may be urged that since Section 54 applies specifically to merchandise withdrawn within three years, an inference must be drawn that some other rate of duty must be deemed to apply to merchandise withdrawn at the expiration of the three year period. This position is untenable, for if there is anything in Section 54 which, by express language has the effect to change or modify the purview of the Act as contained in Sections 1 and 50, this would constitute what is technically known as an exception to the purview. So far as the express language of Section 54 is concerned, it is seen that it added to the purview by admittedly repealing Section 2970. So far as any inference to be drawn, from the exclusion of other merchandise is concerned, it is an unbending rule of construction that the purview cannot be enlarged, nor the exception curtailed by inference.

Sutherland, Sec. 328.

Roberts vs. *Yarborough*, 41 Texas, 452.

Wallace vs. *Stevens*, 74 Texas, 559.

And here it may be observed, that it is impossible to perceive the distinction by which Section 2970 is held to be repealed, and Section 2971 and the Act of 1873 are preserved in force. It is clear then that Section 54 of the McKinley Act left the purview of the Act unmodified as to the rates of duty imposed by it upon the present merchandise, and it now remains to consider the effect of the general saving words as to accrued rights, etc., of Section 55 of the McKinley Act, and what is here said upon this subject will apply equally to the same words to be found in Section 72 of the Wilson Act.

V.

The general saving words as to liabilities incurred, rights accruing and accrued, and acts done under existing laws do not relate to specific changes of duty.

The grounds asserted for the decision of the Court below seem necessarily to imply the admission that the duties on the merchandise in this case would have been changed by the McKinley and Wilson Acts, but for the provisions of the general saving clause as to accrued rights, etc., in these Acts, which are claimed to have preserved the former rates of duties.

Attention is called to the fact that the general saving words in these Acts apply to rights accruing, as well as accrued. What is meant by an accruing right? Could it be intended that from the moment that the Government's right to duty arose, upon the importation of merchandise, there could be no change as to rates of duties or methods of procedure or remedies in the enforcement of the payment of duty? Yet, if the contention of the appellee is correct, this result would follow, since every revenue Act, tariff and administrative, is found to contain similar words and clauses to those now under consideration, and thus from the beginning, rights accruing and accrued liabilities incurred, and acts done and performed under existing Acts, would have been continued in force and saved up to the present time.

The rights of the Government are not the only rights to be considered.

It is to be observed that while the appellee asserts that the right to collect duties at the rates enforced at the time of what is denominated as abandonment is preserved, no distinction between that and any other right to duties is suggested, nor are the rights of the importer to withdraw his merchandise at pre-existing rates considered.

If general saving words are to be given force, as contended by appellee, then at the time of the enactment of Section 2079, imposing an additional duty of 10 per cent., and of every act relative to abandonment, owing to the presence of general saving words, the importer would have had the right to withdraw his merchandise, without reference to the sections, by payment of duties at the rates in force prior to the enactment of those sections and laws; and, in case of increase by the subsequent law, could have invoked the saving words and clauses as saving his rights; but no such construction has ever been put upon the statutes; and it is a fact that today the department is engaged in delivering merchandise to importers which has been in the warehouse for a period of less than three years, and also beyond three years, at the rates of the present law, whenever the rate is higher than that imposed by the former law. Objection is never made, and permit to withdraw never withheld, under such circumstances. It is only when the present law reduces the amount of duties to be collected upon his merchandise, and a benefit will accrue to him from the change of rates, that the saving clause of these Acts is invoked by the Government and the importer gets into trouble.

Rules of construction as to saving words and clauses.

We think that it is plain that the question at bar is one as to the change in rate and amount of duty; that it confessedly appears that the change in rates and amount has been made by the McKinley and Wilson Acts, unless the saving clauses here considered have, by repugnancy to the purview of those

Acts prevented such change; and we assert that under the plainest and settled rules of construction the general saving words must yield to the specific purview (Sutherland, Sec. 221-246, and cases cited in notes.)

If then, the present merchandise meets the condition which would place it within the purview of either the McKinley or Wilson Acts, as to rates, and of the change thereby made (and as we have seen, this seems to be admitted,) and it is necessary to resort to the general saving clause to prevent effect of the purview, or to change or modify it in any way, that clause must yield to the purview under this rule.

Again, in applying rules of construction to ascertain the meaning of the law as a whole, taken by its four corners, and there is conflict in its provisions, and it is necessary for one provision to yield to another, it is apparent that the precise meaning of each, as primarily appears from its form and the words used, must be preliminarily discerned, in a certain sense, for this purpose independently of each other; otherwise, the general rule would avail nothing. It could not be ascertained that a case of repugnancy had arisen. So now, it is proper to examine the saving clause by itself under ordinary rules as to its meaning and the effect of its words, taking it as a law, having for its purpose the saving of rights from effect of repeal of law. Thus, reading Section 55 of the McKinley Act and 72 of the Wilson Act, it is seen that they are general, so far as they relate to rights accruing and accrued, and liabilities incurred and acts done under the existing law. They save, first, any act done or any right accruing or accrued, and all rights and liabilities incurred under former laws; they then proceed to a specific enumeration of certain rights and classes of rights, among which are suits and proceedings had or commenced in any civil causes before the said repeal or modification; punishment of offenses, penalties, and forfeitures or liabilities which might have been prosecuted and punished; limitations applicable to civil causes or the prosecution of offenses or for the recovery of penalties and forfeitures; suits, proceedings, and rights and

acts upon which civil and criminal causes might be predicated.

Now, it is an unbending rule that general laws become specific by enumeration of the persons, things, and conditions to which they relate. General terms, accompanied by or concluding with specific enumeration are held to be limited to things of the same kind. It is restricted to the same genus as the things enumerated.

Sutherland, 268–270, and cases cited in note.

Tested by its own terms, the saving clause will be given definite and natural meaning by confining the general words therein to be found to the rights which are specifically enumerated, without doing violence to the purview of the Act and rendering it nugatory.

United States vs. *Campbell*, 10 Fed., 816.

In that case the imported merchandise had been entered and withdrawn and duties paid. Seven years afterwards a mistake was discovered in the liquidation, by which the Government had lost about $400 of legal duties. The United States then brought suit against the sureties on the bond, to recover this deficiency.

The Act of June 22nd, 1874, passed subsequent to the entry and original liquidation, made the liquidation binding and conclusive on all parties after one year from the date of payment of the duties and liquidation.

Previous to the passage of this Act the Government had been allowed, under former decisions, to re-liquidate duties against importers without any limitation of time, and such re-liquidation was a necessary condition precedent to the suit for deficiency arising under the erroneous liquidation, which, in that case, had taken place before the Act. The Court held the Act of 1874 applicable, and the remedy barred.

Upon this point, Judge Brown of the Southern District of New York, said : "It is urged that Section 26 of that Act " (June 22, 1874), declares that 'nothing herein contained " shall affect existing rights of the United States.' But it is

"impossible to hold, as it seems to me, that the effect of this "saving clause is to nullify every specific clause in the Act "when a right of the United States is affected. The Act "relates to several different subjects, and many of its provisions "modify, more or less, rights formerly existing. Section 16 "expressly applies to suits 'now pending,' and the existing "rights of the United States in such suits were greatly "affected thereby through a submission to the jury of the ques- "tion of actual intent to defraud.

"'Acts and parts of Acts inconsistent with the provisions "of this Act are repealed;' and then comes the saving clause "as to 'existing rights.' The general words of this clause "must be held to be subordinate to the specific provisions "of particular sections, which show a manifest intent to apply "to past transactions. The purpose of that clause was, I "think, simply to prevent any existing rights of the United "States from being wholly cut off, or affected otherwise than "expressly provided."

It follows, that at the time when the Wilson Act took effect, it found the merchandise at bar subject to the rates of duty prescribed in the schedules and paragraphs of the McKinley Act. The McKinley Act cannot be construed to mean that merchandise should be subject to a duty, say at the rate of $13.44 per ton, but the right of the Government is preserved, at the same time, to collect a duty upon the same merchandise of $17.00 per ton.

Repeals by Implication.

No question of repeal of statutes by implication arises in this case, so far as affects rates of duty. The repeals of inconsistent Acts and parts of Acts here considered are made by express words. Moreover, changes in rates and amounts of duties on merchandise are of the nature of revision, and the Acts prescribing such changes are substitutes for the former Act.

In re Strause, 46 Fed., 522.

The Wilson Act.

Section 1 of the Wilson Act contains a clear, definite, precise and mandatory provision which makes all merchandise imported or withdrawn for consumption, without regard to the antecedent condition of the merchandise so withdrawn, subject to the duties contained in its schedules and paragraphs. It specifically deals with the fact of withdrawal, and provides that imported merchandise, when withdrawn, shall be subject to said rates.

Indeed, the words "or withdrawn" are the chief substantive words describing the condition to which the rates of the Wilson Act are to apply. Strictly speaking, the word "imported" might have been omitted, because merchandise could not be withdrawn for consumption from the Custom House unless it had been imported merchandise. That word was a natural and apt word in the connection in which it was used, but it was not so significant or indicative of the intention of Congress in applying rates of duty as the words "or withdrawn" which follow it.

The section required that on and after the day when the Act took effect there should be levied and collected the prescribed duty on all imported merchandise; and as if that were not sufficiently definite to make known the intent of Congress, the words "or withdrawn" etc., were used, and in these words must be found the description of the condition to which the purview of the Act related. To hold otherwise would be to deprive the words "withdrawn for consumption," of all meaning. As stated by the Board in its decision: "The words 'or withdrawn for consumption' are new matter, " not appearing in the Acts of 1883 or 1890, and there is " abundant proof by the debates in Congress to show that " they were intended to place all merchandise in bonded " warehouses prior to August 1st, 1894, and entered for con- " sumption after that date, upon a parity with respect to rates " of duty with merchandise imported on and after August 1, " 1894. The use of the conjunction 'or' instead of 'and,' is

" in itself persuasive of the intent of Congress in this respect,
" if not conclusive. There is no provision in the Act of 1894
" which by terms, or even by implication, excludes any class
" of merchandise withdrawn for consumption after August 1,
" 1894, from entry at the reduced rates provided for therein"
(Rec., p. 18.)

If anything more had been necessary to show that the words "or withdrawn for consumption," were inserted by Congress *ex industria*, for the express purpose of including, as subject to the duties prescribed by the Act, all merchandise withdrawn, whether imported before or after the Act took effect, and without regard to its previous status, the Board of General Appraisers might have also added a reference to the history of the Bill.

As finally passed, no section or sections corresponding to Section 50 or 54 of the McKinley Act are to be found in the Act, and this fact alone is significant. Congress had for years been enacting laws in which provisions similar to Sections 50 and 54 of the McKinley Act, and 2970 of the Revised Statutes, relating to the duties to be collected on merchandise in warehouse for different periods of time; but in the Wilson Act none of these provisions are to be found, and it is not to be presumed that this omission occurred from carelessness or lack of intention.

When the bill went to the Senate from the House, the words "or withdrawn for consumption," now found in Section 1 of the Act, did not appear in it, but the bill contained a section corresponding to Section 50 of the McKinley Act. (See Congressional Record, May 10, 1894, commencing on page 6431.)

In the Senate amendments were offered to strike out Section 46 of the bill, and to insert in Section 1 the veritable words, "or withdrawn for consumption," here considered. This also cannot be presumed to have been done without intention.

Whatever weight may properly be given by the Court, to the Congressional debates upon these amendments, and to the

expression of the reasons and opinions of individual members concerning them, it is certain that the policy of extending the application of the law to all imported merchandise was thoroughly and forcibly urged, and that after this debate both amendments prevailed. Section 46 was stricken out, and Section 1 was amended to read as it now reads.

Wilson Act.

We are led at this point to ask if Section 1 of the Wilson Act is not to be accepted as describing the conditions to which it relates and as defining the status of the merchandise to which its rate of duty applies, where are we to look for this description and definition? Is it to be asserted that the general saving words of the Wilson Act saved something which had been before saved by the McKinley Act?

We have already seen that such a theory has been literally cut up by the roots, and that to adopt it would defeat the power of the Government to increase or decrease any rate of duty which had once become attached to imported merchandise.

This power has never been denied. It has been exercised in every tariff act in the history government, and we have been unable to find any act in which general saving words of the character now discussed were not made to attend the changes made, and the repealing clauses.

But upon this point we rest upon what we have heretofore said in another part of this Brief.

The intention of the Wilson Act, gathered from its express language and from its history, is made so clear as to admit of no reasonable doubt, that there should not be two rates of duty prevailing upon merchandise which was to enter the markets of the country at the same time; an intention which has uniformly pervaded all tariff legislation, since and before the passage of the warehousing Act of 1846; an intention which has not only been made manifest, as we have seen by the statutes themselves, but derived, declared, and sanctioned

by the Courts. This equality of footing to competition is accomplished by permitting the importer to warehouse his goods, and extending his time for payment of duties, by providing margins as to time in which he may avail himself of existing low rates, by withdrawal of his goods, by providing for refunds, drawbacks, and exportations; by making provisions in warehouse bonds which contemplate changes in rates of duty while goods are in warehouse; and when changes are made in rates of duty, by fixing a day *in futuro* for the effect of the change, to enable business men to adjust their affairs and business and thus prevent mischievous consequences, and other like considerations.

U. S. vs. *Burr*, 15 S. C. 1,004.
Hartranft vs. *Oliver*, 125 U. S., 525.
Merritt vs. *Cameron*, 137 U. S., 542.

All of these matters are more or less directly related to equality of rates of duty to all importers, and upon such equality not only the stability and welfare of the business of the importers depend, but also that of the nation itself.

Under this policy, duties when collected are leveled to meet the conditions and requirements of business as they exist at the time when duties are collected.

While the actual amount involved in the present case is small, the consequences of the decision by this Court as a precedent for the future guidance in the enforcement of the revenue laws are far-reaching; and the questions involved are not to be decided upon narrow or technical views as to the construction of statutes or upon indefinite, uncertain, or forced interpretations put upon the meaning of general words or clauses, but upon the broad and comprehensive principles underlying the law itself.

The fact of withdrawal for consumption of these five tons of rails is accomplished, and cannot be undone. The entry for the withdrawal of merchandise from warehouse is a voluntary proceeding of the importer, and based upon forms prescribed by the Treasury Department more than fifty years

ago, and is essential and technical in the transaction of custom house business as a bill in equity or any other initial proceeding in a Court of law. It would be a breach in the equitable purview of the warehousing laws to attempt to make an entry for withdrawal of merchandise under the Act of 1883, or any other Act which had been repealed.

Upon the fact of withdrawal alone under the Act of 1894, this case may be safely rested.

The stipulation shows that 12 distinct withdrawals were made after the expiration of the three-year period, aggregating 3,606 tons of these importations.

In addition to this, four withdrawals, embracing the remainder of these importations, have been made under protest as to the rate of duty, without any stipulation; a matter of record in the Court below.

During all these transactions no questions were raised as to the right to withdraw; the question was always as to the rate of duty.

The Secretary's letter to the Collector says: "You are "therefore authorized to permit the importers if they shall so "elect to pay the duties upon and to have delivery of a small "portion, say not less than four tons of the above steel rails. "It may be that duties will be so paid under protest in order "that the exaction of duty may be reviewed by the Board of "General Appraisers."

The stipulation, after referring to an offer, by the importers, to make withdrawal entry and pay duties on all the merchandise at the rate of the Wilson Act, contains the following: "This offer has not been accepted by the Treasury Depart- "ment, but authority has been given to make a withdrawal "entry of a portion of the merchandise, at the rate prescribed "by the Tariff Act of 1883, in order that a decision of the "Board of General Appraisers, and of the Court as to the "legal rate of duty chargeable thereon, when withdrawal for "consumption may be obtained." (Rec., p. 14.)

This stipulation was prepared by the Secretary of the Treasury. The purpose of the stipulation is sufficiently shown by the foregoing, but it may be added that the right of the Secretary to authorize a withdrawal could not be tested in this way. These proceedings apply only to tests of rates of duties and of values, under the Administration Act.

The occasion for testing such power of the Secretary would arise only upon his refusal to exercise it, and not upon his exercise of it.

If the owner does not withdraw his merchandise, the Secretary may sell. If he does not exercise it, the merchandise remains in the warehouse subject to duty, just as a pledge is subject to the lien for the security of the payment of the debt for which given. It may or may not be enforced. But if the debt be paid before enforcement of the remedy, the lien is discharged and the property restored to the possession of the owner.

In the present case the goods were not sold. They were withdrawn. The duties were paid. The Board of Appraisers so decided.

A withdrawal entry is the voluntary act of the importer and owner, made in accordance with proceedings prescribed by law and regulations (Sections 2785, 2970, R. S. and *U. S.* vs. *Siedenberg*, 17 Fed., 227).

The sale is the act of the Government, as claimant for duties. One proceeding relieves the Government of its lien and places the merchandise in possession of the owner; the other is a summary act by which the owner is divested of his property by the Government and it is sold to a stranger. One proceeding is a sale of private property for taxes or duties, in which, according to well settled rules, every prerequisite of the Statute having any semblance of benefit or advantage to the owner, must be followed to the precise letter, and strictly complied with.

Thatcher vs. *Powell*, 6 Wheat., 19.

It will thus be seen that after the expiration of three years from the time of original importation, two modes of proceeding were open to the Secretary. One was to advertise and sell the goods, by virtue of the government's matured claim against them for the duties, the other was to postpone the sale and permit the owner to make entry, pay the duties and take them away. Proceedings under the first method would divest the owner of his title to his property and place it in a stranger; a second would continue the title in the owner and place him in possession of the goods. The sale is a summary procedure on the part of the Government, in which the owner has no voice, and of which the mode is minutely prescribed in the statute upon the presumption that the owner had abandoned or waived all his interest in them. The withdrawal entry of the merchandise is the personal and *voluntary* act of the importer himself, in assertion of ownership, in paying the duty and claiming his goods—an entirely different proceeding from that of sale. Both methods are prescribed by law, and each must be strictly followed.

It is a well settled principle of law that when the mode of a proceeding prescribed by the terms of the statute, or by any fair inference from it, no other mode can be substituted as its equivalent. See *Dutihl* vs. *Maxwell*, 2 Blatch. 541.

It must follow, therefore, that the Secretary could not substitute the withdrawal entry of the importer as the equivalent of the sale prescribed by the statute. He chose the former alternative, and in so doing he exercised the large powers conferred upon him by law in reference to the whole subject matter of the bonded warehousing system.

Sec. 2989, R. S., U. S. 15th Op. Atty. Gen., 128.

Since the law gives the Secretary the sole discretion as to when he shall proceed to obtain the duties, it is obvious that no judicial tribunal can question his action. Upon the question of the power and discretion vested in an officer of the Cabinet in determining questions appertaining to his department, the Court, in *U. S.* vs. *Jones*, 18 How. 92, said:

"The Executive Department of the Government, to which "is entrusted the control of the subject-matter, must neces- "sarily determine all questions appertaining to the employ- "ment and payment of such temporary agents, and the "exigency which demands their employment."

"The Secretary of the Navy represents the President and "exercises his power on the subjects confided to his Depart- "ment. He is responsible to the people and the law for "abuse of the powers entrusted to him. His acts and "decisions, on the subjects submitted to his jurisdiction and "control by the Constitution and the laws, do not require the "approval of any officer of another department to make them "valid and conclusive."

This decision has never been modified, except to protect the rights of the importer.

The case of *U. S.* vs. *De Visser*, 10 Fed., 642, which the appellee relies upon, was an action against the surety on a warehouse bond, where a sale of the goods had been postponed without the consent of the surety after the goods had been advertised. The Court held that the surety was not liable, for the reason that the sale was an *essential and inseparable part of the abandonment* proceedings, and was necessary in fixing the duration of the sureties' risk.

The decision supports our contention that there is no abandonment until the sale takes place.

In the Duvivier case also relied on the action was upon a warehouse bond, and the goods had been sold after three years for the non-payment of duties. The question of the applicability of the new rate of duty to goods remaining in warehouse more than three years was held by the Court not to be a material one in that case. The new rate was in terms to apply to goods "withdrawn for consumption." The goods under controversy had been sold, and the suit arose on the warehouse bond. Had they been withdrawn for consumption, the decision might have been different. The case has no perceptible bearing on the present controversy, which involves

the rate and amount of duty imposed after the withdrawal entry had been perfected.

ATTORNEY-GENERAL'S OPINION.

It is proper to allude to the opinion of the Attorney-General under date of January 17, 1895, quoted in argument below and referred to by the Court below as applicable to this case.

It is to be noted—

1. That the opinion related to merchandise to which it was assumed that the Act of 1890 applied, and that, as to the additional ten per centum, Section 2970 was repealed by being superseded by Section 54 of the Tariff Act of 1890.

2. That the Attorney-General then proceeded to deal with two classes of merchandise, the first relating to merchandise not withdrawn for consumption until after the expiration of the three year period.

He refers first to Section 54 of the McKinley Act as superseding 2970 as to three-years merchandise, and making provision for the rates of duty applicable to goods withdrawn within three years. As to this merchandise, he holds that the withdrawal should be at the rates then in force.

Even upon such an assumption, the rates of 1883, on the present merchandise, would have become changed to the rates of the McKinley Act.

But the learned Attorney-General had not yet come to the question as to the effect of the Wilson Act upon merchandise withdrawn after three years. He refers to the provisions of Section 2971 as to abandonment, and to the fact that questions had arisen whether such should be regarded as abandoned and sold and "the proceeds paid into the Treasury," but distinctly asserts "there is no such question, however, "under the Tariff Act of 1894."

His opinion is, therefore, that goods imported and entered for warehouse prior to the Act of 1894, and not withdrawn within three years from date of original importation, are

unaffected by the new rates of duty, and the duties mentioned in Section 2972, R. S., are the duties to which they were previously subject, and the opinion applied not only to goods imported within three years before the Act of 1894 took effect, but to all goods thereafter imported and then subject to the tariff rates of 1890.

The Attorney-General, then, regarded Section 54 of the McKinley Act as a complete substitution of legislation for Section 2970, so as to impose the rates of the McKinley Act on merchandise then in warehouse, even to the extent of removing the additional 10 per centum previously resting upon the merchandise. But as to the Wilson Act, he asserts that no such question can arise, because Section 1 of that Act applies only to merchandise thereafter imported or withdrawn for consumption. It is obvious that the Attorney-General entirely overlooked the significance of the words "or withdrawn for consumption" as they occur in the Wilson Act. These words were just as comprehensive and descriptive of the conditions to which the rates of the Wilson Act applied as were the words of Sections 50 and 54 of the McKinley Act, as to its rates; and if those sections can be deemed to have changed the rates previously existing on merchandise described therein to the extent of removing the additional ten per cent. duty upon it, then the words "or withdrawn for consumption" just as reasonably impose the new rates of the Wilson Act upon merchandise falling within the description of those words. The harmony theory should have been adopted in the one case as well as in the other.

Well defined and adopted meanings must be given to the words of the statute. Merchandise cannot be withdrawn for consumption unless it is imported merchanise.

It need not be withdrawn for consumption immediately upon importation, and if not then withdrawn it is entered for warehousing in bond or for exportation. And the words "or withdrawn for consumption," as they occur in the Wilson Act, mean merchandise which has been imported and which

is immediately taken into possession by the importer, on payment of duties, or has been entered for warehouse.

This is all that was intended by Sections 50 and 54 of the McKinley Act. And as stated before, if those sections were sufficient to change rates of duty, then the Wilson Act itself was sufficient to accomplish the same purpose.

The opinion further shows that the particular facts of this case were not before him at the time of his examination of the laws bearing upon the rates of duty, nor any state of facts analogous thereto fully enough to have enabled him to properly embrace the present case in his expression of opinion. It is assumed that the opinion cannot be regarded as having any other weight than that of a learned advocate of the Government. There is no mention in it of the facts and circumstances connected with this case as set forth in the agreed statement in this record. Had those been given and attention drawn to the long continued practice of the Government of permitting entry of both unclaimed and bonded merchandise after the expiration of the legal limit of time, he would have found it difficult to reconcile the law and practice with some parts of his opinion.

The opinion says there has been a question under previous tariffs as to whether Section 2971, R. S., transfers to the government the ownership of the goods, or whether the goods are to be regarded, after three years, as still warehoused for the benefit of the importer until the government shall sell them; but he left the question where he found it, without any attempt at solution. He then adds that that question is not in issue in the case submitted to him for his opinion, and he then bases his opinion solely on the ground that *because* the merchandise in the case presented to him *had not been withdrawn for consumption* it was not within the scope of the Act of 1894.

In the case before the Attorney-General the merchandise had not been withdrawn for consumption, and so far as known the goods had been abandoned by the owner. In this present

case the merchandise had been entered for withdrawal for consumption and the duties paid, meanwhile remaining in warehouse by express permission, and not abandoned by the owner. It is obvious that the opinion has no relevancy to this particular case, and is not an opinion coming within the scope of the question in controversy.

The Attorney-General disclaims being asked his opinion on the point, whether goods remaining in bonded warehouse more than three years "transfer to the government the own-"ership of the abandoned goods," for he expressly says, "there is no such question * * * under the Tariff Act of "1894." In another place he says, "By the express language "of Section 1 of that Act, the new rates apply, not to all "warehoused goods, as by Section 50 of the Act of 1890, "but only to articles (thereafter) imported from foreign "countries or withdrawn for consumption," inferentially admitting that when they are withdrawn the rate in force under the then existing law would apply.

The opinion seems to hold that bonded goods in warehouse over three years cannot be withdrawn for consumption, but must be sold; while unclaimed goods, not admitted to entry within one year and directed to be sold after that time, may be entered at any time within three years at the then prevailing rates, if not sold, thus making a distinction, in the privilege extended, between one and three years goods, a theoretical exposition of the law not in accordance with its long established practical execution by the officers of the revenue.

But it is not certain what the opinion means as a whole, or in parts; and in view of the theoretical question submitted to the Attorney-General it is not surprising to find, nor disrespectful to him to say, that it is likely to be always a question of purely speculative conjecture as to the true meaning and interpretation of the opinion.

Policy of the Revenue Laws—Equality of Rates.

An important condition attaching to this merchandise, pertinent to the question involved, is the maintenance of uni-

formity in rates of duty levied on the weight at the time of its withdrawal and taking out of bond.

The second proviso of Section 50, McKinley Act, still in force, provides that "duties shall be levied and collected upon "the weight of such merchandise at the time of its with- "drawal." The reason for this is apparent, and is for the protection of the importer, that he shall pay duty on no greater quantity than he actually receives when he pays the duties and gets his goods; hence the duties are determined upon the basis of actual weight at the time when taken from the custody of the Government. This view harmonizes with that of the Board of General Appraisers, and the Secretary of the Treasury, in their efforts to so administer the revenue laws as to make them conform to the spirit of Article I, Section VIII, of the Constitution that "all duties, imposts and excises shall be uniform" throughout the country, and of Section 12, Act of June 10, 1890, that the purpose of creating the Board of U. S. General Appraisers was "to secure lawful and "*uniform* appraisements and classifications at the several "ports."

Steel rails pay duty by weight, 6-10 of one per cent. per pound, under paragraph 117, of the present Act. It may well be asked where is the equality in rates if one importer is compelled to pay $17.80 per ton for his iron and another gets his at $7.80 per ton at the same time?

The protest in this case involves a rate of duty the amount of which is determined by the actual quantity of the merchandise when taken out of bond.

The weight of merchandise often determines the rate which it pays. Take as an illustration an invoice of women's dress goods, which, under paragraph 283, Wilson Act, pays a duty on the value, based on the weight. If the value is not over 50 cents per pound the duty is 40 per cent. ad valorem, if valued at more than 50 cents per pound the duty is 50 per cent. ad valorem. An invoice of such goods weighing 100 lbs. and valued at $50.00 would be entered in bond at the lower rate; and if on withdrawal it weighed one or two

pounds less the rate would be increased to 50 per cent. ad valorem.

It is clear that neither the rate nor the amount of the duty can be ascertained until the merchandise is weighed at the time of withdrawal when the duties thereon are computed and paid. This reasoning suggests an additional thought to that already given as to an "accrued right" of the Government. How can it attach to or affect a rate and amount of duty which cannot be fixed or determined until withdrawn by the importer or otherwise disposed of; since if such a right had the far reaching effect claimed for it by the appellee there could be no changes of rates in a new tariff which contained such a clause as to saving rights.

It is plain that the "accrued right" which the Government has to the duty, whatever it may be, is that given in the schedules and paragraphs of rates in force at the time of withdrawal, and not by the forced construction of saving clauses, nor of a tariff Act long since repealed. Until the goods are sold the *right of the importer* to make entry is as much saved as any other right.

As was said in *Burr* vs. *U. S.*, 66 Fed., 742: "The right " of the Government to exact duties vested at all times and " was being exercised in the making of these laws, and not " that, but individual rights would seem to be intended in " these saving clauses."

The Bonded Warehousing System.

The manifest purpose of the warehousing system is, that whatever goods are in bonded warehouse when a new tariff law goes into operation shall pay only the rates named in that law; that warehoused goods, and goods just arrived, and those to arrive, similar in character, paying at the same time, shall all pay precisely the same rate; that all imported goods should be subjected to the same duty at the same time, to be ascertained by the law in force at the time of their entering into consumption in the markets of the country. The statute

is so framed as to deal with the fact of withdrawal, and not at all with the antecedent status of the goods. If the goods are in warehouse, and as a matter of fact withdrawn for consumption, then the rates prescribed in the Act apply. The statute deals exclusively with the fact of withdrawal, and not with the right of withdrawal. That question was left to the legislature, and cannot be a matter for judicial interpretation, for the Congress has expressed its will very plainly, that if goods are in warehouse, and are withdrawn from such custody by the act of the importer, they shall pay at the rate prescribed by the statute then in force, and this on the grounds of equality, equity and justice. This is the "manifest justice" of the doctrine alluded to by the Supreme Court of the United States in *Hartranft* vs. *Oliver*, 125 U. S. 525. The same doctrine is laid down in *Merritt* vs. *Cameron*, 137 U. S., 542. It is the same principle of uniformity in rates contended for in the Senate debate on the amendment to add the words "or withdrawn for consumption" to the House bill. (See Appendix to this Brief.)

It is the doctrine and point upon which this case turned in the Board of General Appraisers, composed of a body of men selected after much deliberation by the President and Congress, on account of their special training and experience in questions of revenue, to determine rates of duty and fix values in all proceedings in disputed cases. And, finally, it is the pronouncement of a great public policy, which taking note of the fact that some importers bring in their goods in advance of the time of consumption and others do not, declares that both shall have an equal start in the race of competition, and that a highly esteemed source of revenue shall be nourished for the benefit of the Government by assuring those who import merchandise, paying revenue in larger quantities or with more rapidity than others, or who, through business misfortune or inability to pay the duties at the expiration of the credit, shall receive no hurt from any inequality of duty rates when they are placed upon the market.

This assurance has been faithfully redeemed in the Act of 1894.

As the debate shows, high and low tariff men in that Congress, agreed among themselves, that there should not be in force, contemporaneously, one rate of duty for bonded goods and a different rate on goods to arrive; that when an importation should be withdrawn for consumption it should be placed upon an equal footing as to rates as its competitor; and the phraseology of the first section, as it now appears, would accomplish the desired object.

In order to bring about the fact of withdrawal for consumption, it may be said that there must be a concurrence of will and action between the Government and the importer who is to withdraw the goods from the Government custody into his own possession and so place them in the market; whether this mutually arranged and perfected action occurs by reason of a special statutory provision, or by force of an administrative practice already ancient, is of no consequence as respects the fact of entry. In either case the fact is accomplished, the "articles" are withdrawn for consumption and the statute operates to fix the rate of duty.

Upon this point, Mr. Justice Field, in delivering the unanimous opinion of the Court in *Hartranft* vs. *Oliver*, *supra*, said:

"The place where the goods are kept is not the *essential fact*, " but the *custody* of the Government, and the consequent " exclusion of control over them by the owner which calls for " the suspension of *revenue duties.*"

"There is a manifest justice in the rule that goods thus " withheld from the control of the owner or importer shall be "subject only to such duties as are *leviable by the law when he is* " *at the liberty to take possession of them.*"

The same doctrine was previously expressed by Justice Lamar in *Merritt* vs. *Cameron*, 137 U. S., 524. "If the " statute changing the rate of duties goes into effect after the " liquidation of the original entry, a reliquidation must " necessarily take place."

Also by Justice Blatchford in *Hartranft* vs. *Weigmann*, 121 U. S., 609. "We are of opinion that the decision of the "Circuit Court was correct. But if the question were one of "doubt it would be resolved in favor of the importer, as "duties are never imposed on the citizen upon a vague or "doubtful interpretation." *Powers* vs. *Barney*, 5 Blatch, 202 U. S. vs. Isham., 17 Wall., 496.

This position is so manifestedly just that the case might well rest on this point, there being neither mistake nor wilful purpose to evade any legal duty.

In view of the foregoing it is believed to be a violation of all legal and equitable principles of revenue law to collect two different rates of duty upon the same kind of merchandise withdrawn for consumption at the same time, for the reason that one importation was made when the duty was $18.70 per ton, and the other when the law imposed only $7.84 per ton, this being an assumption that two tariffs, with conflicting rates, can be in force at one and the same time.

In *U. S.* vs. *Kent*, 68 Fed., 536, the Circuit Court for the southern district of New York held that the Tariff Acts of 1883 and 1890 were intended to be exhaustive, using the following language in reference to the repeal of Section 7 of the Act of Feb. 8, 1875.

"An examination of the Acts of 1883 and 1890, and con-"sideration of the decisions thereon, have satisfied me "that Congress clearly intended said legislation to be exhaus-"tive and to take the place of all prior legislation."

It is self-evident that whatever may be the power of the Secretary of the Treasury to permit withdrawals after the expiration of three years; whatever right may have accrued to the government to collect duties at given rates upon the present goods; however permanent such rights may have become, it was within the power of the Government, through Congress, to modify, change, or remove them at any time by changing the rate or amount of duty; and if it can be inferred from the reasons and considerations presented to the

Court, or others which have been omitted, that it was the intention of Congress, which legislates in general terms, to include this merchandise in, and make it subject to the changes made by the several acts passed since its importation, then no general words or saving clauses should be permitted to overrule such manifest intention.

The precise points involved in this case have never been decided by any judicial tribunal, although the principles of law applicable have been settled in many cases. This must be our apology for the extended argument. The nearest approach to a parallel case is that of Abbot & Co., in 20 Court of Claims, heretofore fully discussed.

It remains to refer to the facts and to some of the elementary propositions to be kept in mind and applied.

1. It is a question of the rate of duty to be imposed on merchandise remaining in bonded warehouse more than three years, and withdrawn for consumption by permission of the Secretary of the Treasury.

2. The goods became subject to duty at the time of importation, and at the tariff rate provided by the law in force at the time.

3. A bond (*Vide* Appendix) given for duties on warehoused merchandise, in a sum equal to double the estimated duties, and containing a condition for the payment of any increased rate of duty that may thereafter be imposed while the goods remain in warehouse is not a bond for the payment of a fixed sum of money, since the duties may be increased or decreased while the goods are in warehouse, nor for duties at a fixed rate, nor at a fixed time, but the bond continues in force until the duties are paid on the withdrawal of the merchandise, or until the goods are sold.

4. The bonded warehousing system of the country was created for the convenience and benefit of importers, and the government custody of imported merchandise is to secure the payment of duties at the time when the merchandise is taken out.

5. The effect of the so-called abandonment clause of the revenue statutes, even assuming it to be operative, was to place the goods in such relation to the Government that it could obtain the duties by sale whenever it saw proper, and the only right which the Government acquired to the goods at the expiration of three years was the right to sell the goods, but was not a right of ownership.

6. The right and title of the goods remain in the importer until he has permitted their actual sale, which is the essential feature of abandonment of bonded merchandise.

7. In permitting the importer, after the expiration of three years, to make withdrawal entry of this merchandise upon payment of the duties and charges thereon, the Government waived its right of sale, and thereby removed the only disability, if there were any, attaching to these goods, and brought them, as warehoused goods, within the operation of the Tariff Act in force at the time of entry for withdrawal.

8. The postponements of sale, and the authorizations of withdrawal of the merchandise from bond after the expiration of three years were administrative acts of the Secretary of the Treasury, exercised in pursuance of the wide discretion given him in the enforcement of the warehousing Acts, and of the long-continued practice of the Treasury Department.

9. A withdrawal entry of merchandise for consumption cannot be the equivalent of the sale of merchandise provided for under the so-called abandonment provisions of the statute.

10. Under the settled rule of revenue law that an interpretation uniformly followed by the Treasury Department and of long continuance that the sale of goods in warehouse over three years is not made mandatory upon the Secretary will be acquiesced in by the courts.

11. It is a well-settled rule in interpreting revenue laws that the entry of merchandise for consumption carries with it the rate of duty in force at the time it is presented at the Custom House.

12. The Court will take judicial notice of the fact that the Tariff Act of 1883 has been repealed, and that two different tariff rates of duty cannot be exacted upon the same class of merchandise at the same time.

13. A withdrawal entry for consumption cannot be made under a repealed act.

14. The Court will take judicial notice of the fact that it was the purpose of the Wilson Tariff Act of 1894, to reduce the duties on imported merchandise and to make the rates uniform and applicable to all merchandise in bonded warehouse at the time the law took effect (see the decision in this case of the Board of Appraisers.

15. Duties are never to be imposed on the citizen upon a vague or doubtful interpretation.

16. Every ambiguity must be construed, every fair intendment must be made in favor of the importer.

17. It is always a presumption of law that a statute was not intended to work injustice.

18. The spirit and reason of the revenue law requiring equality in rates of duty, any construction not resulting in such equality cannot be a correct interpretation.

It is, therefore, most respectfully maintained, that the Court below erred in deciding 1. "That the merchandise involved in " this controversy became abandoned to the Government within " the meaning of the law and of Section 2971 of the R. S. of U. " S. at the expiration of three years from the date of its original " importation, and at the time of its withdrawal from bond, " as aforesaid, such merchandise was such abandoned goods " and was liable to be sold under the provisions of section " 2971, 2972, U. S. R. S."

2. "That such merchandise upon its withdrawal from bond " aforesaid was subject to the rates of duty in force at the " time of its abandonment, as contained in the tariff act of " March 3, 1883, and section 2960, U. S. R. S., regardless of

"changes in tariff schedules contained in the tariff acts of "October 1, 1890, and August 1, 1894, subsequent to such "abandonment."

3. "That said rails are dutiable upon such withdrawals at "the rate of $17.00 a ton, under paragraph 147 of said tariff "act of March 3, 1883, and such warehouse charges as may "have by law accrued thereon, together with ten per cent. of "such duties and charges additional thereto, under section "2970, U. S. R. S." And in reversing the decision of the Board of U. S. General Appraisers in this case, and other errors set forth in the Record, pp. 59 and 60.

It is, therefore, urged that the decree of the U. S. Circuit Court of Appeals and the decree of the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California in this case should be reversed.

WM. PINKNEY WHYTE,
Counsel for Appellant.

MEMO:—This brief, with certain modifications now made, was prepared by the local Counsel in California, and on account of its exhaustive discussion of the questions, has been adopted and filed by the present counsel for appellant.

APPENDIX—A.

[Extracts from the debate in the U. S. Senate on the amendment to the First Section of the Wilson Bill, to add the words, "or withdrawn for consumption." See Congressional Record, May 10, 1894, page 5431.]

Senator Aldrich said: "The amendment which the Com-
" mittee on Finance proposes, is to have the new rates apply
" to goods withdrawn from warehouse for consumption."

Senator Jones (Ark.) said: "The Bill, with the amendment,
" has been submitted to the Secretary of the Treasury and
" meets his approval."

Senator Allison said: "Whatever goods are in bond when
" the law takes effect, in equity, in my belief, should only pay
" the rate which may be found in the law afterwards."

Senator Harris said: "It seems to me that every considera-
" tion of equality, of justice and equity, demands that at the
" time of payment, the two should pay precisely the same
" rate of duty."

Senator Sherman said: "My own opinion is (and in that I
" agree with some of my colleagues) that the duties can only
" be levied upon imported goods at the time they enter into
" consumption * * * that all goods imported should be
" subject to the same duty imposed by the law at the time of
" withdrawal."

Senator Mills: "They (the importers) pay according to the
" law in force when withdrawn from bond for consumption."

Senator Vest: "He (the importer) pays under the law in
" effect at the time * * * he pays under the existing law
" when they are withdrawn."

Copy of the Condition of Warehouse Bond.

"Now, therefore, the condition of the above obligation is
" such, that if within one year from the date of original
" importation of said goods, wares and merchandise shall be

"regularly and lawfully withdrawn from public store or "bonded warehouse on payment of the duties and charges *to* "*which they shall be then subject;* or if, after the expiration of "*one year*, and within *three years*, from the said date of original "importation, they shall be so withdrawn upon like payment, "with 10 per cent. added upon the amount of such duties "and charges, or if, at any time within three years from the "said date of original importation they shall be so withdrawn "for actual export beyond the limits of the United States, "then the above obligation to be void, otherwise to remain in "full force."

Art. 384, Customs Regs., 1892.

(Copy.)

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY.

WASHINGTON, D. C., June 10, 1895.

Collector of Customs, San Francisco, Cal.:

SIR:—The Department is in receipt of your letter of the 20th instant, in which you state that Messrs. William Wolff & Co., of your port, desire to withdraw from bond ten barrels of American Whiskey, which were imported from Liverpool in May, 1892, and you ask instructions as to the rate applicable thereto upon such withdrawal, the goods having been in bond more than three years.

You are hereby instructed that the whiskey in question is now subject to sale, as abandoned merchandise. Should the importer desire to obtain possession of the same he may be permitted to do so on payment of the internal revenue tax, under the Act of August 28, 1894, and should he desire to contest the validity of such exaction, duty should be paid under protest.

Respectfully yours,

C. S. HAMLIN,
Assistant Secretary.
E. B. JEROME,
Special Deputy Collector.

(Copy of original on file.)

TREASURY DEPARTMENT,
WASHINGTON, D. C., Feb. 27, 1884.

Circular: (Synopsis) 6199.

Within three years during which goods remaining in bonded warehouse may be withdrawn, collectors of customs will notify the parties concerned of the date in which the period limited by law will expire. After such date, and at any time before the goods are listed for sale the Collector may allow a withdrawal entry for consumption, to be made on payment of all charges and expenses, and the duties, regular and additional, which may have accrued. The same measures will be taken, so far as applicable, in the case of unclaimed goods which have not been entered at the Custom House.

H. F. FRENCH,
Assistant Secretary.

To Collectors of Customs.